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3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON  
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6 UNITED STATES OF AMERICA, )  
7 Plaintiff, ) NO. CR-11-0042-JLQ  
8 ) ORDER DENYING  
9 vs. ) MOTION TO RECONSIDER  
10 KEVIN HARPHAM, )  
11 Defendant. )  
12

13 BEFORE THE COURT is Defendant's "Motion to Reconsider Motion to  
14 Withdraw Plea" (ECF No. 240) in which the Defendant again seeks to withdraw his pleas  
15 of guilty. The Government has filed a Response (ECF No. 247) and Defendant has filed  
16 a Reply (ECF No. 248). The court has determined that no further hearing is required.

17 **I. Introduction and Procedural Background**

18 Defendant Kevin Harpham made his initial appearance in this matter on March 9,  
19 2011. Thereafter, the Defendant was represented by the Federal Defender for the Eastern  
20 District of Washington, Roger Peven, and two very experienced and qualified Assistant  
21 Federal Defenders, Kailey Moran and Kimberly Deater. After six months of actively  
22 litigating this matter, including the determination of arrest and search issues, Defendant  
23 chose to plead guilty and entered into a Rule 11(c)(1)(C) Plea Agreement, (ECF No.  
24 200), with the Government.

25 One of the charges to which the Defendant pled guilty, Count I, Attempted Use of  
26 a Weapon of Mass Destruction, carried a maximum possible penalty of life  
27 imprisonment. The Plea Agreement provided for a recommended prison sentence of 32

1 years by the Government and 27 years by the Defendant. The Defendant was entitled to  
2 withdraw the guilty pleas if the sentence imposed exceeded 32 years.

3 A plea hearing was held on September 7, 2011, at which the Government  
4 presented a lengthy factual recitation of the charged offenses. After hearing the  
5 recitation and the factual stipulations in the Plea Agreement, the Defendant stated that  
6 he was satisfied the Government could prove those factual matters. Defendant entered  
7 a plea of Guilty to both Count I, Attempted Use of a Weapon of Mass Destruction, and  
8 Count III, the hate crimes charge of the Superseding Indictment arising from the  
9 placement by the Defendant of an explosive device along the route of the 2011 Martin  
10 Luther King, Jr. Day march. The court found the pleas were knowing and voluntary, and  
11 not the product of fear, coercion, or ignorance. The Defendant has never denied placing  
12 the explosive device along the parade route.

13 The matter was set for sentencing on November 30, 2011. At Defendant's request,  
14 the sentencing was continued for three weeks to December 20, 2011. On the morning of  
15 December 20, 2011, Defendant orally moved to withdraw his pleas of guilty. After  
16 hearing from counsel for over an hour, the court determined that there was not even a  
17 *prima facie* showing of any fair and just reason to allow withdrawal of the pleas. The  
18 court denied the motion and proceeded with sentencing. On December 23, 2011, the  
19 court issued a written opinion memorializing and further elaborating upon its oral ruling.  
20 (ECF No. 236). The sentencing Judgment was entered on December 27, 2011. On  
21 December 29, 2011, Defendant filed the Motion to Reconsider that is now before the  
22 court.

## 23 **II. Defendant's Motion to Reconsider**

24 Defendant's written Motion is a further elaboration on the contention he made the  
25 morning of sentencing that he had retained a new expert, and that this expert would opine  
26 that Defendant's "backpack bomb" does not meet the definition of "explosive or  
27 incendiary device" contained in 18 U.S.C. § 232, and thus would not support conviction

1 under 18 U.S.C. § 249 as charged in Count III. Defendant also now supports his Motion  
2 with a five-page letter from this new ‘expert’, Frederic Whitehurst. (ECF No. 241-1).  
3 Notably this new report contains no information on the purported expert’s background  
4 or qualifications, other than the mere heading proclaiming him to be a “J.D., Ph.D.  
5 Attorney at Law, Forensic Consultant.” Whitehurst concludes when analyzing Section  
6 232(5) that the “device is not a bomb, grenade or missile but a “firearm”. (ECF No. 241-  
7 1, p. 19). However, he also concludes: “This device is similar to a bomb, a grenade or  
8 a missile in that it functions by very fast oxidation-reduction chemical reaction of the  
9 energetic materials within it.” (*Id.*). Whitehurst appears to conclude that Harpham’s IED  
10 is more akin to a shotgun than a bomb. Whitehurst also appears to call into question  
11 whether the device would have functioned as intended, or whether the wiring was  
12 sufficient to initiate the device. He states: “Therefore, without a functioning initiator, this  
13 device could not be determined to be a bomb, a missile, a gun, or a grenade.” (ECF No.  
14 241-1, p. 20).

15 Defendant does not contend, nor does the Whitehurst paper suggest, that the  
16 Defendant had a colorable defense to Count I, which defines “weapon of mass  
17 destruction” by reference to “destructive device” as defined in 18 U.S.C. § 921. Count  
18 I carries a maximum sentence of life imprisonment. The court sentenced Harpham to 32  
19 years on Count I. The court sentenced Harpham to 10 years on Count III to run  
20 concurrent with the 32 year sentence imposed on Count I. In calculating the Sentencing  
21 Guideline Range the court found the existence of upward departures for “substantial risk  
22 of death or serious bodily injury to more than one person” (U.S.S.G. § 2A2.1) and intent  
23 to intimidate a civilian population (U.S.S.G. § 3A1.4). See Sentencing Memorandum  
24 (ECF No. 237). Defendant’s mistaken confidence in this new meritless argument  
25 concerning Counts III and IV, is not a fair and just reason for withdrawal of the pleas.

26  
27 This court previously issued a detailed Opinion (ECF No. 236) setting forth the

1 many reasons why it denied Harpham's oral request to withdraw his pleas on the morning  
2 of sentencing. Among the numerous reasons were that this untimely retained expert was  
3 offering a legal opinion on a matter of statutory interpretation, which is a matter for the  
4 court, and the argument that Harpham's IED was not an "explosive or incendiary device"  
5 under § 232(5)(B) was patently meritless. A review of Whitehurst's report only  
6 reinforces the court's conclusions.

7 Harpham was charged in Count III of the Superseding Indictment, and pled guilty  
8 to, "attempt[] to cause bodily injury with an explosive device, to wit, an improvised  
9 explosive device...in violation of 18 U.S.C. § 249." Section 249 defines "explosive or  
10 incendiary device" by reference to Section 232(5), which includes "any explosive bomb,  
11 grenade, missile, or similar device." Whitehurst concludes that Harpham's IED "is  
12 similar to a bomb, a grenade or a missile in that it functions by very fast oxidation-  
13 reduction chemical reaction of the energetic materials within it." (ECF No.241-1, p. 19).  
14 Thus Harpham's untimely retained expert would still find the device within the statutory  
15 definition applicable to Count III, but apparently also contends there is an issue of  
16 "vagueness". No motion was ever filed in this case challenging Section 232(5) as void  
17 for vagueness.

18 Furthermore, courts which have addressed the definitions provided in Section  
19 232(5) have found them to be broad, and have seemed untroubled by the "similar device"  
20 language. The Seventh Circuit, in *United States v. Agrillo-Ladlad*, 675 F.2d 905, 913 (7<sup>th</sup>  
21 Cir. 1982) stated: "In this case the legislative history and the expert testimony illuminate  
22 the reach of section 232(5). First, there need only be a potential for explosion. And  
23 second, Congress understood the term "bomb" to cover a wide range of explosives." In  
24 *Agrillo-Ladlad*, the court found that naptha soaked newspapers met the definition of  
25 explosive or incendiary device.

26  
27 In *United States v. Mena*, 933 F.2d 19, 26-27 (1<sup>st</sup> Cir. 1991), the First Circuit

1 similarly found that Congress intended the definitions in Section 232(5) to have breadth:  
2 “In enacting 18 U.S.C. § 232(5), Congress cast its definitional net quite widely.” In  
3 *Mena*, defendant presented testimony that the “kerosene-like” liquid in his device was not  
4 flammable in the scientific sense that its vapors would not ignite below 100 degrees  
5 Fahrenheit. The court found itself not bound by the expert testimony on flammability:  
6 “[We] are not disposed to say that flammability, in the technical sense, is a requisite  
7 element of the statute of conviction. To the contrary, any theoretical glow sparked by this  
8 scientific testimony is easily extinguished by the weight of existing precedent.” *Id.* at 27.  
9 The court instead followed the plain meaning of flammable: “unless Congress has pointed  
10 the other way, courts should endeavor to read familiar words in the manner that ordinary  
11 people would most likely understand.” *Id.* at 27. On the issue of “similar device,” the  
12 court observed that: “nothing in the statute’s text or structure limits the term “similar  
13 device” to the specifically described category of appliances.” *Id.* at 28, n.8. Even if the  
14 device was not “flammable,” it “was certainly close enough in nature to an explosive or  
15 incendiary device to qualify as “similar” under the statute.” *Id.*

16 The *Mena* opinion illustrates that the court is not bound by an expert’s legal  
17 opinion on a matter of statutory interpretation. Harpham agreed that the device he  
18 constructed was an improvised explosive device containing a charge and shrapnel,  
19 explosive black powder, and a triggering system. (See Opinion ECF 236, p. 4). This  
20 certainly falls within the definition of what an ordinary person would understand to be  
21 a “bomb” or “explosive device”. Even Whitehurst’s tortured analysis, which attempts  
22 to equate the device as analogous to a shotgun, admits Harpham’s IED is similar to a  
23 bomb, a grenade or a missile.

24 As previously discussed by the court in its prior Opinion (ECF No. 236), the  
25 alleged untimely discovery of a meritless legal argument is not a fair and just reason for  
26 withdrawal of a plea. See *United States v. Betts*, 2011 WL 5519648 (9<sup>th</sup> Cir.  
27 2011)(unpublished)(“While a defendant does not have to demonstrate the defense would

1 have been successful...failure to inform [defendant] of a non-viable defense would not  
2 plausibly lead a reasonable person to decide not to plead guilty.”); *United States v.*  
3 *Soriano-Hernandez*, 310 F.3d 1099, 1104 (8<sup>th</sup> Cir. 2002)(defendant failed to present fair  
4 and just reason for withdrawal of guilty plea because even if defendant had not waived  
5 statute of limitations defense, the defense was not viable); *United States v. Tunnell*, 64  
6 F.3d 667, \*1 (9<sup>th</sup> Cir. 1995)(unpublished)(defendant’s “new found misunderstanding of  
7 [statute of conviction] is not a fair and just reason for withdrawal of his guilty plea.”).  
8 The court finds no grounds to reconsider its prior ruling, and Defendant’s Motion (ECF  
9 No. 240) is **DENIED**.

### 10 **III. Jurisdiction and Rule 11(e)**

11 The Government argues in its Response (ECF No. 247) that this court may lack  
12 jurisdiction by reason of Fed.R.Crim.P. 35 and 18 U.S.C. § 3582. The court rejects this  
13 argument as the Defendant is not seeking modification or correction of the sentence.  
14 Accordingly, as set forth *supra*, the court has addressed the merits of Defendant’s Motion  
15 to Reconsider.

16 As stated in this court’s prior Order (ECF No. 246), both the Supreme Court and  
17 the Ninth Circuit have held that the district court retains jurisdiction post-sentencing to  
18 entertain a motion to reconsider that is timely filed before the time to appeal has expired.  
19 See *United States v. Dieter*, 429 U.S. 6, 8-9 (1976); *U.S. v. Lefler*, 880 F.2d 233 (9<sup>th</sup> Cir.  
20 1989). However, after the 2002 Amendments to Fed.R.Crim.P. 11, Rule 11(e) has  
21 provided that: “After the court imposes sentence, the defendant may not withdraw a plea  
22 of guilty or nolo contendere, and the plea may be set aside only on direct appeal or  
23 collateral attack.” The Advisory Committee Notes to the 2002 Amendments provide that  
24 Rule 11(e) as amended, “makes it clear that it is not possible for a defendant to withdraw  
25 a plea after sentence is imposed.” Thus, an argument could be made that this court does  
26 not have the authority to grant the pending Motion to Reconsider because it would  
27 effectively allow withdrawal of the plea after sentencing—which is prohibited by Rule

1 11(e). However, this court would find that the policy behind *Dieter* and *Lefler* of  
2 allowing districts courts to correct their own alleged errors and to avoid unnecessarily  
3 burdening the appellate courts does allow consideration of Harpham's Motion to  
4 Reconsider given the procedural posture of this matter.

5 **IV. Time to Appeal**

6 This court previously ruled that: "Defendant's time for filing a notice of appeal  
7 shall run anew if the Defendant's Motion for Reconsideration is denied." (ECF No. 246,  
8 p. 2). This would mean Harpham would have 14 days from the date of this Order to  
9 timely file a notice of appeal. However, were the appellate court to determine that this  
10 court had no authority to consider the Motion to Reconsider, by reason of Rule 11(e),  
11 then the appellate court may find the Motion to Reconsider did not toll the time to appeal.  
12 Some courts have suggested the court cannot grant, post-sentencing, a motion to  
13 reconsider concerning withdrawal of a plea: "Even if [defendant's] motion for  
14 reconsideration is construed as a renewed motion to withdraw his guilty plea, the district  
15 court properly denied the post-sentence motion because Rule 11 prohibits a defendant  
16 from withdrawing a guilty plea after a sentencing." *United States v. Brown*, 156  
17 Fed.Appx. 209, 211 n. 1 (11<sup>th</sup> Cir. 2005). Other courts have also refused to allow tolling  
18 of the time for notice of appeal, except based on the filing of those motions specifically  
19 enumerated in Fed.R.App.P. 4(b)(3). *See United States v. Garduno*, 506 F.3d 1287, 1291  
20 (10<sup>th</sup> Cir. 2007)("The text of Rule 4(b) does not indicate that motions other than those  
21 enumerated may toll the time for filing a notice of appeal. Nor are there any statements  
22 by the advisory committee or in the case law supporting a functional equivalency  
23 application of Rule 4(b)(3)(A). We decline to recognize such application here.").  
24 Motions to reconsider are not specifically enumerated in Rule 4(b)(3). However, under  
25 *Dieter* and *Lefler*, this court did find, and does find, the time tolled.

26 Furthermore, Defendant did timely file a Motion to Extend Time (ECF No. 243)  
27 and this court finds good cause to extend the time for filing a notice of appeal pursuant



1 to Fed.R.App.P. 4(b)(4).

2 **IT IS HEREBY ORDERED:**

3 1. Defendant's Motion to Reconsider (ECF No. 240) is **DENIED**.

4 2. No further motions for reconsideration/rehearing will be entertained.

5 3. The time for filing a notice of appeal has commenced with the filing of this  
6 Order. Defendant, if he chooses, and subject to the terms of the Plea Agreement  
7 including the waiver of appeal rights in paragraph 16, **shall have 14 days from the date**  
8 **of this Order to file a notice of appeal.**

9 **IT IS SO ORDERED.**

10 The Clerk shall enter this Order, furnish copies to counsel, and close the file.

11 Dated this 25<sup>th</sup> day of January, 2012.

12 s/ Justin L. Quackenbush  
13 JUSTIN L. QUACKENBUSH  
14 SENIOR UNITED STATES DISTRICT JUDGE  
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